Supreme Court, U.S.
FILED
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MELIANA DENIKOV, BOBAN SAROV,
and LELA SAROV,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the
Appellate Court of Illinois
Fifth District

PETITION FOR WRIT OF CERTIORARI

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(1a) QUESTION PRESENTED

1. Are the due process rights of the defendants denied where the Appellate Court erroneously expanded the nature and scope of the conspiracy charged, based upon the overt acts alleged, and thereby permitted imposition of convictions and sentences for both the inchoate offense (conspiracy to commit theft and burglary) and the principal offense (burglary)?

(1b) PARTIES INVOLVED [per Rule 21.1(b)]

Petitioners, Meliana Denikov, Boban Sarov, and Lela Sarov, were the defendants in the Circuit Court for the Third Judicial Circuit, Bond County, appellants in the Appellate Court of Illinois, Fifth Judicial District, and petitioners in the Supreme Court of Illinois.

Respondent, People of the State of Illinois, was the plaintiff in the Circuit Court, appellee in the Appellate Court of Illinois, and respondent in the Supreme Court of Illinois.

(1c) TABLE OF CONTENTS

PAGE

Question Presented i

Parties Involved ii

Table of Contents iii

Judgment Below v

Table of Authorities vi

Prayer for Certiorari. 1

Judgment and Opinion Below 2

Jurisdictional Statement 3

Constitutional Provision 4

Statement of the Case 5

Statement of Facts 7

Raising the Federal Question Below . 10

Reason for Granting Certiorari . . . 12

1. Defendants' due process rights were denied where the Appellate Court erroneously expanded the nature and scope of the conspiracy charged, based upon the overt acts alleged, and thereby

permitted imposition of convictions and sentences for both the inchoate offense (conspiracy to commit theft and burglary) and the principal offense (burglary). Certiorari should be granted for this Court to clarify that a one cannot constitutionally be convicted of and sentenced for an offense other than that charged 12

Conclusion 18

Appendices:

A. Illinois Appellate Court "Rule 23 Order," No. 5-94-0098, dated April 4, 1995. . . . . App. 1

B. Illinois Appellate Court Order denying rehearing, No. 5-94-0098, dated April 28, 1995. . App. 52

C. Illinois Supreme Court Order, denying petition for leave

to appeal, No. 79088, dated
October 4, 1995..... App. 54

(1d) Judgment Below

The Rule 23 Order of the Appellate Court of Illinois, No. 5-94-0098, dated April 4, 1995, is attached as Appendix A to this Petition. It is not reported.

TABLE OF AUTHORITIES

PAGE

CASES

Cole v. Arkansas, 333 U.S. 196,
92 L.Ed. 644 (1948)..... 11, 13, 17

Ex Parte Bain, 121 U.S. 1,
30 L.Ed. 849 (1887)..... 11, 12, 17

Stirone v. United States,
361 U.S. 212,
4 L.Ed.2d 252 (1960)....11, 12-13, 17

Jackson v. Virginia, 443 U.S. 307,
61 L.Ed.2d 560 (1979).....11, 13, 17

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Fourteenth Amendment, U.S. Const.
(due process clause) . 5, 12, 13, 17

28 U.S.C. 1257(a) 3

Supreme Court Rule 10.1 3

Supreme Court Rule 12.1 3

Supreme Court Rule 13.1 3

Chap. 38, Ill.Rev.Stat. § 8-2. 5

Chap. 38, Ill.Rev.Stat. § 8-4. .5, 9, 16

Chap. 38, Ill.Rev.Stat.
§ 16-1(a)(1)(A) 5, 9, 16

Chap. 38, Ill.Rev.Stat. § 19-1 .5, 8, 15

720 ILCS 5/8-5 14

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Petitioners, Meliana Denikov, Boban Sarov, and Lela Sarov, (hereafter, petitioners, or defendants), pray that a Writ of Certiorari issue to review the judgment of the Appellate Court of

Illinois, 5th District, affirming the judgment (conviction and sentence) of the Circuit Court for the Third Judicial Circuit, Bond County, Illinois.

Judgment and Opinion Below

The Rule 23 Order of the Illinois Appellate Court, Fifth District, dated April 4, 1995, is set out as App. A (App. 1); it is not reported.

The Order of the Appellate Court, Fifth District, dated April 28, 1995, denying rehearing, is set out as App. B. (App. 52)

The Order of the Supreme Court of Illinois denying petition for leave to appeal, No. 79088, dated October 4, 1995, is set out as App. C. (App. 54)

Jurisdictional Statement

On April 4, 1995, the Appellate Court of Illinois, Fifth Judicial District, (App. A) affirmed the judgment of the Circuit Court. Timely-filed Petition for Rehearing was denied on April 28, 1995. (App. B) Petition for Leave to Appeal to the Supreme Court of Illinois, No. 79088, was denied on October 4, 1995. (App. C)

This Petition for Certiorari is timely filed within 90 days thereafter.

Jurisdiction is invoked under 28 U.S.C. Sec. 1257(a) and Rules 10.1, 12.1 and 13.1 of this Court.

Constitutional Provisions

The Fourteenth Amendment to the U.S. Constitution (due process clause) provides, in pertinent part:

> "Section 1 ... No State shall ... deprive any person of life, liberty, or property, without due process of law; ..."

STATEMENT OF THE CASE

Defendants were charged by information in the Circuit Court of Bond County, Illinois, with (Count I) theft of property of CC's Food Mart, Greenville, Illinois, in violation of Chap. 38, Ill.Rev.Stat. § 16-1(a)(A), a class 3 felony; (Count II) burglary of the same establishment with intent to commit theft therein, in violation of Chap. 38, Ill.Rev.Stat. § 19-1, a class 2 felony; (Count III) conspiracy to commit offenses against the People of the State of Illinois, that is, theft as alleged in Counts I and II, and to conceal same, in violation of Chap. 38, Ill.Rev.Stat. §§ 16-1(a)(1)(A), 8-4, and 8-2, a Class 4 felony. The Information is set out in detail in the affirming

Order of the Appellate Court, App. A, pp. App. 1-11.

Following a bench trial, defendants were convicted and sentenced as follows: Meliana Denikov was convicted on counts II (5 years' imprisonment) and III (e years' imprisonment), sentences to run consecutively; Boban Sarov was convicted on Counts II (4 years) and III (3 years), to run consecutively, and fined $5,000 on each count plus court costs; and Lela Sarov was convicted on Counts II (4 years) and III (3 years), consecutively, and fined $1,000 on each count plus court costs.

On appeal, the Appellate Court affirmed the convictions and sentences, in an opinion (App. A), the rationale of which is to expand and alter the scope

of the conspiracy charge from that in the charging instrument.

Statement of Facts

Here, the charging document for Counts II and III related to and was limited to a conspiracy to commit (Count III) theft on February 23, 1992 at CC's Food Mart, and burglary of said CC's Food Mart on February 23, 1992. Count II charges a burglary--[entered or remained within a building ... with intent to commit theft]--as follows:

> "On **February 23, 1992**, in Bond County, Illinois, the defendants **Meliana Denikov**[,] **Boban Sarov** and **Lela Sarov** did commit the offense of **burglary** in that the said defendants without authority, **knowingly** **entered or remained** **within a building** of another person, to wit, **CC's Food mart, Greenville, Illinois,** **with the intent to commit**

> **therein, a theft**, in violation of Chapter 38, Illinois Revised Statutes, Section 19-1. A Class 2 felony." (Information, Count II; Emphases added.)

Count III charges those same three named defendants, together with four other defendants, with conspiracy to commit theft--including **precisely** the same allegations as the burglary charged in Count II.

More particularly, Count III, par. 2 alleges *(inter alia)*:

> "Between on or about February 22, 1992 and February 24, 1992 in Bond County, Illinois and elsewhere, [7 named] defendants ... did knowingly and willfully combine, **conspire**, confederate **and agree** together and with each other and with other persons to the authorities known and unknown, **to commit offenses** against the People of the State of Illinois, that is:

> "To knowingly obtain, unauthorized control over property of others with intent to deprive the individuals permanently of the use and benefit of said property, in violation of Chapter 38, Illinois Revised Statutes, Sections 16-1(a)(1)(A) and 8-4, **as more fully set forth in Counts** I and **II and which the People reallege and incorporate herein**, and did conspire to conceal said deprivations of property." (Emphasis added.)

That is, in Count III, par. 2, as just quoted, Count III expressly and specifically incorporates and realleges exactly, the allegations of Count II. Because of the incorporation, the conspiracy was the inchoate offense to the principal offense--burglary.

The evidentiary facts adduced at trial are fully set out in the affirming Appellate Court Rule 23 Order (App. A),

not repeated here to avoid unnecessary duplication.

RAISING THE FEDERAL QUESTION BELOW

In their appeal, defendants argued (*inter alia*) that their convictions and consecutive sentences violated due process because the object of the conspiracy (Count III) was the same as the substantive offenses in Counts I and II.

In affirming, the Appellate Court (see App. A) expanded the nature and scope of the conspiracy charged, based upon the overt acts alleged.

In their Petition for Rehearing, defendants argued that their rights to due process of law were denied by this affirming Appellate Court order, and cited in support of the proposition that

"A defendant cannot constitutionally, consistent with due process of law, be tried on charged not made in the charging instrument," this Court's constitutionally-based decisions in Ex Parte Bain, 121 U.S. 1, 30 L.Ed. 849 (1887), Stirone v. United States, 361 U.S. 212, 4 L.Ed.2d 252 (1960), Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560 (1979), and Cole v. Arkansas, 333 U.S. 196, 92 L.Ed. 644 (1948). (Petition for Rehearing, No. 5-94-0098, pp. 1-2) Rehearing was denied. (App. B)

The same constitutional contention and authorities were presented in defendants' Petition for Leave to Appeal to the Illinois Supreme Court, No. 79088, which was denied. (App. C)

REASON FOR GRANTING CERTIORARI

1.

The due process rights of defendants were violated when the Appellate Court erroneously expanded the nature and scope of the conspiracy, based upon the overt acts alleged, and thereby permitted imposition of convictions for both the inchoate offense (conspiracy to commit theft and burglary) and the principal offense (burglary).

Certiorari should be granted for this Court to clarify that a one cannot constitutionally be convicted of and sentenced for an offense other than that charged.

A defendant cannot constitutionally, consistent with due process of law, be tried, convicted and sentenced on charges not made in the charging instrument. Ex Parte Bain, 121 U.S. 1, 30 L.Ed. 849 (1887); accord, Stirone v. United States, 361 U.S. 212, 4 L.Ed.2d 252 (1960) (fatal, constitutional error

to find defendant guilty on theory not made in charging instrument). In Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560 (1979), this Court stated that a conviction based on a charge not made, violates due process of law.

In Cole v. Arkansas, 333 U.S. 196, 92 L.Ed. 644 (1948), this Court held:

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. * * * It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." 333 U.S. at 201.

Here, compliance with this constitutionally-mandated principle

would have prevented, under application of Illinois statute, the defendants being convicted and separately sentenced for the offenses of burglary and conspiracy to commit the exact same burglary. Under Illinois statute, 720 ILCS 5/8-5, one cannot be convicted of an inchoate offense if one is convicted of the primary offense. It reads:

> "No person shall be convicted of both the inchoate and the principal offense."

Here, the charging document for Counts II and III related to and was limited to a conspiracy to commit (Count III) theft on February 23, 1992 at CC's Food Mart, and burglary of said CC's Food Mart on February 23, 1992. Count II charges a burglary--[entered or remained within a building ... with

intent to commit theft]--as follows:

> "On February 23, 1992, in Bond County, Illinois, the defendants Meliana Denikov[,] Boban Sarov and Lela Sarov did commit the offense of burglary in that the said defendants without authority, knowingly entered or remained within a building of another person, to wit, CC's Food mart, Greenville, Illinois, with the intent to commit therein, a theft, in violation of Chapter 38, Illinois Revised Statutes, Section 19-1. A Class 2 felony." (Information, Count II; Emphases added.)

Count III charges those same three named defendants, together with four other defendants, with conspiracy to commit theft--including precisely the same allegations as the burglary charged in Count II.

More particularly, Count III, par. 2 alleges *(inter alia)*:

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> County, Illinois and elsewhere, [7 named] defendants ... did knowingly and willfully combine, **conspire**, confederate **and agree** together and with each other and with other persons to the authorities known and unknown, **to commit offenses** against the People of the State of Illinois, that is:
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> > "To knowingly obtain, unauthorized control over property of others with intent to deprive the individuals permanently of the use and benefit of said property, in violation of Chapter 38, Illinois Revised Statutes, Sections 16-1(a)(1)(A) and 8-4, **as more fully set forth in Counts** I and **II and which the People reallege and incorporate herein**, and did conspire to conceal said deprivations of property." (Emphasis added.)

That is, in Count III, par. 2, as just quoted, Count III expressly and specifically incorporates and realleges exactly, the allegations of Count II. Because of the incorporation, the

conspiracy was the inchoate offense to the principal offense--burglary. Hence, under 720 ILCS 5/8-5, defendants could not be convicted of both. (See p. 14, supra.)

Here, the State trial court and Appellate Court violated the defendants' constitutional rights by holding that the allegation of overt acts in the conspiracy charge broadened the conspiracy charge. This holding violates the principles that defendant cannot be tried, convicted and sentenced for an offense for which he was not charged. Bain, Stirone, Jackson v. Virginia, Cole v. Arkansas - all, supra.

The Illinois courts' utter disregard for this salutary, controlling due process principle, should be scrutinized

by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorney for
Petitioners